Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of	)	
Petition of Mid-Rivers Telephone Cooperative, Inc. for Order Declaring it to be an Incumbent Local Exchange Carrier in Terry, Montana Pursuant to Section 251(h)(2)	)	WC Docket No. 02-78

COMMENTS OF AT&T CORP.

Pursuant to the Commission's *Notice*[1] and Section 1.415 of its Rules, 47 C.F.R. § 1.415, AT&T Corp. ("AT&T") submits these comments on the Petition of Mid-Rivers Telephone Cooperative, Inc. ("Mid-Rivers") requesting that the Commission issue an order declaring that Mid-Rivers be treated as the incumbent local exchange carrier ("ILEC") in the Terry, Montana telephone exchange, pursuant to Section 251(h)(2) of the Communications Act of 1934, as amended, 47 U.S.C. § 251(h)(2).

The *Notice* seeks comment on how Section 251(h)(2)[2] should be applied to Mid-Rivers' specific factual situation as well as to future petitions of this type. Assuming

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[1] Petition of Mid-Rivers Telephone Cooperative, Inc. for Order Declaring it to be an Incumbent Local Exchange Carrier in Terry, Montana Pursuant to Section 251(h)(2), WC Docket No. 02-78, Notice of Proposed Rulemaking, FCC 04-252, released Nov. 15, 2004 ("Notice"), published in 69 Fed. Reg. 69573 (Nov. 30, 2004).

[2] Section 251(h)(2) states, in its entirety:

> The Commission may, by rule, provide for the treatment of a local exchange carrier (or class or category thereof) as an incumbent local exchange carrier for purposes of this section if – (A) such carrier occupies a position in the market for telephone exchange service within an area that is comparable to the position occupied by a carrier described in paragraph (1); (B) such carrier has substantially replaced an incumbent local exchange carrier described in paragraph (1); and (C) such treatment is consistent with the public interest, convenience, and necessity and the purposes of this section.

that the Commission does not permit Mid-Rivers to assess any access charge increases as a result of its decision here, AT&T does not oppose the grant of Mid-Rivers' petition and focuses its comments on several issues relating to the general application of this statute in this and future cases. Specifically, AT&T urges that in applying Section 251(h)(2)(A), a carrier "occupies" the market position of the prior ILEC when it provides local exchange service using its *own* facilities, not through resale of another carrier's facilities or the use of unbundled network elements ("UNEs") purchased from another carrier, and that it is providing service to "all or virtually all" of the subscribers in the service area through the use of such facilities. For purposes of Section 251(h)(2)(B), "replace" should be read in its ordinary everyday sense, to require that a comparable carrier's facilities "take the place of" or supplant the landline facilities of the previously designated incumbent carrier. With respect to the public interest provision of Section 251(h)(2)(C), AT&T agrees that the potential for increased access charges is a valid factor that the Commission should consider in its public interest analysis. Thus, if the Commission grants the Petition, it should not permit Mid-Rivers to impose access rate increases until the Commission completes intercarrier compensation reform.

i. Section 251(h)(2)(A) – Comparable Market Position

Section 251(h)(2)(A), the first of the three required criteria, specifies that a local exchange carrier other than the initially designated incumbent may be treated as an ILEC if "such carrier occupies a position in the market for telephone exchange service within an area that is comparable to the position occupied by a carrier described in paragraph (1)."[3] The *Notice* (¶ 6) cites to the Commission's only prior precedent in applying

[3] Paragraph 1 defines an incumbent LEC as a LEC that provided local exchange in such

Section 251(h), the *Guam Declaratory Ruling and NPRM*, 12 FCC Rcd. 6925, ¶ 26 (1997) ("*Guam Order*"),[4] and observes that "incumbent LECs typically occupy a dominant position in the market for telephone exchange service in their respective operating areas, and possess economies of density, connectivity, and scale that make efficient competitive entry quite difficult, if not impossible, absent compliance with the obligations of Section 251(c)."[5]

AT&T agrees with this observation and urges the Commission to further clarify that Section 251(h)(2) requires that a carrier occupying a market position "comparable to the position occupied by an [ILEC]" must provide service using its *own* facilities, and not through resale or UNEs. This result follows inevitably from the application of the statute, because no carrier that is not using its own facilities could reasonably be said to occupy a "comparable" position to that held by any pre-1996 Act ILEC, all of which, to AT&T's knowledge, were facilities-based. It is the ownership and control of bottleneck exchange access facilities, not their use as a result of resale or leasing from another carrier, that gives an ILEC the monopoly power that the 1996 Act sought to curb and which Section

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area and was a member of NECA pursuant to Section 69.601(b) of the Commission's regulations on the date the 1996 Act was enacted.

[4] The conclusions set forth in the *Guam Order* were adopted in full in *Guam Report and Order*, 13 FCC Rcd. 13765 (1998).

[5] The *Notice* (¶ 7) also asks for comment on how to define the relevant "area" for the purposes of Section 251(h)(2)(A). AT&T believes that, in the unique circumstances presented in Mid-Rivers' petition, an "area" may be construed to be a single exchange because it is consistent with the pro-competitive intent of the 1996 Act. Only if a carrier is designated an ILEC does it become subject to the pro-competitive provisions of Section 251(c) of the Act, including *inter alia* the duty to negotiate interconnection agreements and to provide interconnection. If Mid-Rivers' Terry, Montana exchange were not designated such an "area," then competition in that exchange would be greatly impeded, to the detriment of the newly captive customers and potential competitors in the exchange.

251(h)(2) assumes will be the hallmark for LECs who may subsequently assume incumbent status. In particular, carriers should *not* be permitted to abuse Section 251(h)(2) in order to obtain USF payments as an ILEC, or to impose access rate increases when they are not operating as facilities-based carriers. Naturally, there can only be one ILEC in any given area, and if a carrier is reliant on resale or lease of the historical ILEC's network, only the historical ILEC can be treated as the incumbent under 251(h)(2). Accordingly, the Commission should explicitly rule that the comparability requirement of Section 251(h)(2)(A) can only be satisfied if the new applicant is providing service using its *own* facilities, rather than reselling the existing incumbent's service or leasing network elements from the existing incumbent.

The requirement of Section 251(h)(2) that the applying LEC "occup[y] a *position in the market* for telephone exchange service . . . comparable to the position occupied" by the historical ILEC also necessarily means that the new ILEC must have a market share comparable to that of the previous ILEC. This also follows from the "replace" provision in Section 251(h)(2)(B). The Commission should therefore adhere to its holding in the *Guam Order* (¶ 38) that the statute is not satisfied unless the applicant LEC provides service "to all or virtually all" of the subscribers in a service area. In this regard, AT&T agrees with the tentative conclusion of the *Notice* (¶ 9) that Mid-Rivers' stated market share of 93% would satisfy this requirement.

ii. Section 251(h)(2)(B) – "Substantially Replaced" the Incumbent

Section 251(h)(2)(B) requires a showing that the new carrier "has substantially replaced an incumbent local exchange carrier described in paragraph (1)." The *Notice* (¶ 9) seeks comment on the percentage of subscribers that a carrier must win from

the existing ILEC to gain such designation, an issue AT&T addressed above. The "replace" and "comparable" requirements in subsection (h)(2)(B) should be interpreted to mean that the new carrier must provide the same *type* of local exchange service provided by the prior ILEC, *i.e.*, wireline service. In its ordinary everyday sense, "replace" means "to take the place of esp[ecially] as a substitute or successor," and is synonymous with "displace, supplant, supercede."[6] Thus, a carrier (e.g., a wireless service provider) could not gain incumbent status by providing a service that merely *supplemented* an existing ILEC's service but did not cause the customer to cease using (*i.e.,* completely disconnect) their existing wireline local exchange service. This requirement also appears to be self-evident from the plain meaning of the statute, but an explicit holding to this effect should help preclude attempts to subject the statute to abusive interpretations by carriers who stand to gain financially from incumbent status, but are not within the statute's scope or intent.

iii. Section 251 (h) (2) (C) – The Public Interest

In addition to satisfying the first two prongs of the statute, a petitioning LEC must satisfy the requirement of Section 251(h)(2)(C) that "such treatment is consistent with the public interest, convenience, and necessity and the purposes of this Section." The *Notice* (¶ 12) invites parties to comment on whether "potential increases in access charges should be a factor that the Commission considers in its public interest analysis under Section 251(h)(2)." The Commission can and should consider the impact of potential increases in access rates in its public interest analysis. Mid-Rivers has previously

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[6] Webster's New Collegiate Dictionary (1979).

indicated that it intends to increase access rates if it is granted ILEC status[7] though it does not directly address a rate increase or its potential size in its Petition. Depending upon its size, a rate increase could well result in undue hardship to captive ratepayers by exacerbating the competitive disadvantage national carriers face as a result of Section 254(g)'s rate averaging requirement and thus impeding competition in the affected area. Therefore, the Commission should consider the size of any potential rate increase in its public interest analysis and take action to ameliorate the impact of rate increases that may have undue negative impact on customers or competitors. Indeed, the result most consistent with the public interest is that Mid-Rivers, as a newly designated ILEC, should be precluded from increasing access rates until the Commission completes its intercarrier compensation reform.

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[7] *See ex parte* Letter from David Cosson, Counsel for Mid-Rivers Telephone Cooperative, Inc., to Marlene H. Dortch, Secretary, Federal Communications Commission, filed Sept. 27, 2004, attaching the Reply of Mid-Rivers Telephone Cooperative, Inc. to FCC's Opposition to Mid-Rivers' Petition for Mandamus in the United States Court of Appeals for the D.C. Circuit, filed Aug. 25, 2004, *In re Mid-Rivers Telephone Cooperative,* Inc., No. 04-1163, at 3-4.

CONCLUSION

For the foregoing reasons, AT&T does not oppose grant of Mid-Rivers Petition, so long as the public interest is protected by restricting any increase in access rates, and urges the Commission to apply Section 251(h)(2) of the Act in accordance with its plain meaning, as discussed herein.

Respectfully Submitted,

AT&T Corp.

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